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No. 87-1274

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

JUDY CATES, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF JAMES CATES, DECEASED,

Petitioner,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ITT REINSURANCE COMPANY OF LONDON, ITT LIFE INSURANCE COMPANY, HARTFORD LIFE INSURANCE COMPANY, HARTFORD INSURANCE GROUP AND ALBERT J. STRATTON, ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS,

Respondents.

RESPONSE OF RESPONDENT ALBERT J. STRATTON ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

As discussed herein, because Petitioner has failed to comprehend the issues presented in connection with their Petition for a Writ of Certiorari, Respondent submits that only the following question is presented to this Court, rather than those questions specified by Petitioner:

1. Whether the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") erred in holding that the United States District Court for the Southern District of Texas, Houston Division (the "District Court") acted properly, and without abusing its discretion, in denying Petitioner's motions for leave to file amended complaints, dismissing her action with prejudice, and denying her motion for new trial.

LIST OF PARTIES

ROBERT J. BOYER

THE ESTATE OF JAMES CATES

JUDY CATES

J. MICHAEL COLLINS

BENTON MUSSLEWHITE

G. C. PETTEY, III

NEWTON B. SCHWARTZ

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

ITT LIFE INSURANCE COMPANY

ITT REINSURANCE COMPANY OF LONDON

HARTFORD LIFE INSURANCE COMPANY

HARTFORD LIFE INSURANCE GROUP

ALBERT J. STRATTON, ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS

SAN JAC CORPORATION

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Respondent, Albert J. Stratton, on behalf of himself and certain other Underwriters at Lloyds, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this proceeding entered on December 1, 1987 (attached as Appendix D to the Petition).

STATEMENT OF THE CASE

Respondent respectfully declines to accept Petitioner's Statement of the Case, the presentation of the questions presented and the statement as to which constitutional provisions, statutes and rules are involved in this case as set forth in the Petition for Writ of Certiorari. That presentation of the facts and issues involved in this case includes numerous opinions and inaccuracies which present a uniquely distorted view of this case. Respondent therefore submits the following Statement of the Case.[1]

Despite nearly eight years of pendency, including two appeals to the Fifth Circuit by Petitioner, little significant discovery has been undertaken and this suit has never been tried on the merits. In that time, although five unsuccessful attempts at drafting an understandable complaint have been made, Petitioner has failed to frame an intelligible pleading. Respondent knows little more than that Petitioner's allegations arise out of her deceased husband's involvement with San Jacinto International and San Jacinto Association, two Texas general partnerships (collectively, the "Partnerships") and their contracts with the ITT Defendants and Stratton. Because of Petitioner's

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1. This suit was originally brought by James Cates. Since his death, prior to the first appeal to the Fifth Circuit, suit has been continued by his widow, Judy Cates. For the purpose of this Response, Judy Cates will be referred to as "Cates" or "Petitioner" unless otherwise indicated. International Telephone and Telegraph Corporation, ITT Reinsurance Company of London, ITT Life Insurance Company, Hartford Life Insurance Company, and Hartford Insurance Group will be collectively referred to as the "ITT Defendants".

own pleading deficiencies, Respondent cannot provide this Court with any meaningful summary of the facts upon which Cates bases her allegations. It is important, however, for this Court to understand the tortured history of this case and the conduct of Petitioner and her counsel in this case to appreciate Petitioner's virtually complete disregard of the orders and rulings of the Fifth Circuit and the District Court.

This case was originally filed in 1979. Over four years ago, the District Court granted Defendants' Motion for Summary Judgment on the ground that Cates had not stated any personal cause of action and was prohibited from asserting claims on behalf of the Partnerships in her individual capacity. Cates appealed that decision to the Fifth Circuit. In a lengthy opinion, the Fifth Circuit remanded Cates' cause of action to determine only one threshold issue:

> whether sufficiently exceptional circumstances exist so that Mrs. Cates should be allowed to prosecute the partnership causes of action, or so that the case should be held in abeyance pending either appointment of a receiver to prosecute those claims or the completion of the partnership dissolution in which Mrs. Cates might receive a fractional interest in the partnership causes of action.

Cates v. International Telephone and Telegraph Corporation, 756 F.2d 1161 (5th Cir. 1985). The Fifth Circuit also concluded that Petitioner had no cause of action for (i) breach of the Partnership agreements, (ii) restraint of the Partnership's business, (iii) loss in the value of any Partnership interest, (iv) loss of income therefrom, (v) loss of salary or bonus from any Partnership, (vi) damages to

reputation to any Partnership, or (vii) any prospective advantage arising from the damage to or failure of any Partnership business. *Id.* at 1181-1183.

In reversing the District Court, the Fifth Circuit pointedly noted that Cates'

> pleadings and motions were extremely *conclusory, confused and unclear.* They would appear not to comply either with the requirements that pleadings contain "a short and plain statement of the claim" and "be simple, concise and direct," Fed. R. Civ. P. 8(a) and (e)(1) . . . And our reversal and remand does not imply that the District Court need countenance improper pleading . . .

Id. at 1180-1181 (emphasis added). Continuing its extraordinary public critique of the form of Cates' pleadings, the Fifth Circuit emphasized that

> We realize that Cates' second amended complaint is so *general, conclusory and confused,* and that allegations therein which might arguably state individual claims are so intermingled with and undifferentiated from those which are plainly the statement of partnership claims, that it is most difficult, if not impossible, to precisely identify what individual claims are stated or to adequately address their validity on the merits. Clearly the second amended complaint is *defective as a matter of form.*

Id. at 1182 (emphasis added). In a final laconic comment on the form of Cates' pleadings, the Fifth Circuit suggested that [f]or future guidance in this and other aspects of the present litigation, we call attention to the provision of Rule 11 . . . *Id.* at 1171, note 16.

Thus, in its perceptive dissection of Cates' defective Second Amended Complaint, the Fifth Circuit recognized

that the form of a pleading may be so "confused" that it is impossible "to adequately address [its] validity on the merits." *Id.* at 1182. Cates' pleadings have yet to achieve a level of intelligibility sufficient for the "merits" to be "adequately addressed." Nevertheless, as "confused," "defective," or "conclusory" as the Second Amended Complaint undoubtedly was, that pleading has proved to be the most intelligible and coherent of all of Cates' pleadings. Subsequent pleadings deteriorated into greater distortion and confusion.

In the interlude between the two appeals of this matter, the only "new" facts of consequence concerned Petitioner's counsel's efforts to delay the District Court by misrepresenting the status of Civil Action No. 80-35964 in the 151st Judicial District Court in Harris County, Texas ("companion state court case"), as discussed below.

On August 19, 1985, after remand from the Fifth Circuit to the District Court, the District Court held a status conference concerning this case and instructed counsel, including Cates' attorney, Benton Musslewhite ("Musslewhite"), to formulate an agenda to set the course of pretrial proceedings. Musslewhite drafted and transmitted to Stratton (but not to the ITT Defendants), a proposed agenda. Although Stratton returned the agenda with suggested revisions, Musslewhite never finalized or filed the agenda with the District Court. Consequently, Stratton and the ITT Defendants submitted their Motion to Set Agenda for Pretrial Matters without the benefit of Cates' participation.

On September 25, 1985, Cates filed her Motion for Leave to File Third Amended Complaint. In its 68 pages,

the proposed complaint failed to address the crucial threshold issue of "exceptional circumstances", which the Fifth Circuit had identified as the only issue to be decided on remand of the case. Instead, Cates added new parties and new causes of action, including alleged violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1984) ("RICO"), the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE § 17.41 *et seq.* (Vernon's 1988), libel, slander, breach of fiduciary duty, misappropriation of trade secrets, and others, and requested an injunction and the appointment of a receiver. Apparently oblivious to the overriding purpose of the remand by the Fifth Circuit, Cates continued to include James Cates as a party to underlying contracts, allege James Cates' purported authority to sue, and assert Partnership claims as personal causes of action. Cates also requested that the District Court restrain further proceedings pending the appointment of a receiver in the companion state court case noted above.

On November 4, 1985, Stratton and the ITT Defendants filed their Joint Opposition to Motion for Leave to File Third Amended Complaint, Motion for Sanctions Under Rule 11, and Motion for a More Definite Statement Under Rule 12. Defendants demonstrated that Cates had: (1) wholly ignored the issue of whether "exceptional circumstances" existed to allow Cates to sue on a Partnership claim; (2) reasserted claims that were moot or affirmed on appeal as properly dismissed; (3) falsely alleged James Cates to be a party to contracts; and (4) asserted new causes of action without alleging factual support, all in violation of Fed. R. Civ. P. 11.

On December 16, 1986, the District Court held a hearing on Cates' Motion for Leave to File Third Amended Complaint. The February 7, 1986 Order issuing from that hearing denied Cates' Motion. A copy of that Order is attached as Appendix E to the Petition. The District Court found that:

(1) the Third Amended Complaint was defective as a matter of form;

(2) the Third Amended Complaint failed to comply with Fed. R. Civ. P. 8(a), 8(e), and 9;

(3) Cates failed to separate personal causes of action from Partnership claims; and

(4) Cates' attempt to add new claims and parties would unduly prejudice Defendants because of Cates' seven-year delay in raising these claims.

The Order prohibited Cates from pleading any claims which the Fifth Circuit had found moot, from adding new claims not specifically included in Cates' Second Amended Complaint, and from adding new parties. Finally, the Order directed Cates to file an amended complaint within twenty days of February 7, 1986.

On the day the Amended Complaint was due, Cates filed her Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint. This Motion was never granted. Four days after the deadline set by the District Court in its Order, Cates filed her Motion for Leave to File Fourth Amended Complaint and proposed Fourth Amended Complaint (together, the "Fourth Complaint Motion").

On March 4, 1986, Stratton and the ITT Defendants filed a Joint Motion to Dismiss Cates' Complaint with prejudice asserting, *inter alia,* that Cates had failed to comply with the orders of either the Fifth Circuit or the District Court and had failed to correct pleading deficiencies.

On March 10, 1986, the District Court held a docket call. Consistent with her conduct throughout seven years of litigation, Cates announced that she was not ready and requested yet another continuance. The District Court denied Cates' request.

On March 12, 1986, the ITT Defendants filed their Opposition to Cates' Motion for Leave to File Fourth Amended Complaint. On March 24, 1986, Stratton filed his Opposition to the same Motion. In those Oppositions, Stratton and the ITT Defendants chronicled Cates' failure to comply with the District Court's Orders. In contravention of the February 7, 1986 Order, Cates had: (1) asserted the mooted claims that James Cates was originally authorized to bring suit and that James Cates had offered to buy out his partners; (2) alleged new (prohibited) causes of action for wrongful death, loss of consortium, and hastened death, conversion, slander and slander of credit; and (3) asserted the mooted claims of diminution of value of his Partnership interest or share of Partnership income, salary or bonus, breach of agreements, tortious interference with business, loss of business reputation or goodwill, loss of opportunity for future advancement and loss of prospective advantages.

On April 11, 1986, the District Court held a hearing on the Fourth Complaint Motion and Defendants' Joint

Motion to Dismiss with prejudice. The court denied the Fourth Complaint Motion and granted Defendants' March 4, 1986 Motion to Dismiss.

On or about April 21, 1986, Cates sought review by the District Court of its rulings by way of Motion for New Trial. In that Motion, Cates represented to the District Court that a receiver had been appointed in the companion state court case and purported to incorporate by reference the state court order appointing a receiver over the Partnership; however, no such state court order was attached. On May 14, 1986, the ITT Defendants filed their Response to Cates' Motion for New Trial. On May 16, 1986, Stratton filed his Opposition to Cates' Motion for New Trial.

After filing her Motion for New Trial, Cates continued to harass Stratton and the ITT Defendants by filing various inappropriate Motions.[2]

On August 19, 1986, the District Court issued its Order denying Cates' Motion for New Trial and denying Defendants' Motion for Sanctions. The District Court found that Cates had failed to cure the fatal flaws of the Third Amended Complaint, which was defective as a matter of form, had failed to comply with the mandate of the Fifth Circuit, and had failed to comply with the District Court's Order of February 7, 1986. The District Court also made

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2. Among the motions filed were a Motion for Extension of Time, Motion for Leave to File Fifth Amended Complaint, Motion for Additional Relief, Motion for New Trial and Reconsideration, and Supplement to Motion for New Trial And/Or Reconsideration. In her Motion for Additional Relief, Cates repeatedly based her arguments on the purported "appointment" of a receiver in the companion state court case.

two significant findings: first, contrary to Cates' representations as certified by her counsel's signature, the facts showed that *no receiver had been appointed* in the companion state court case; and second, that sanctions might be imposed pursuant to Fed. R. Civ. P. 11 because of the continued refusal by Cates' counsel, Musslewhite, to follow the directives of the District Court. Thus, for the second time, Cates received an express warning of impending sanctions. Yet, even though the District Court had seen through Cates' "receiver" charade, it forebore from awarding sanctions for deliberate misrepresentations tantamount to fraud.

Almost six months after the Order of Dismissal, Cates belatedly filed her second notice of appeal with the Fifth Circuit. On December 1, 1987, in a one paragraph opinion, the Fifth Circuit held that the District Court had "ample grounds" to dismiss the Fourth Amended Complaint with prejudice and to deny a new trial, and that the District Court "acted properly" in so doing. This was the only issue considered by the Fifth Circuit; no decision was rendered regarding the compliance or noncompliance by Petitioner with any of the Federal Rules of Civil Procedure regarding any of the Second, Third, Fourth or Fifth Complaints.

Cates then filed a Petition for Writ of Certiorari with this Court. As originally filed, the Petition was not accepted for filing by the Clerk of this Court for failure to comply with the Court's Rules of Practice. This Response is directed to the amended Petition.

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REASONS FOR DENYING THE WRIT

I. The Decisions Below Do Not Create Any Conflict Among the Courts of Appeal or Raise Any Questions Under Federal Law.

Cates has continuously failed to appreciate the effect of the rulings of the District Court and the Fifth Circuit noted herein, and the Petition for Writ of Certiorari indicates that this failure to grasp the issues presented persists. The only issue to be considered by this Court in reviewing the Petition for Writ of Certiorari is whether the Fifth Circuit ruled correctly in holding that the District Court did not abuse its discretion in refusing to allow Cates to amend her complaint and in dismissing this case. No questions under federal law or the United States Constitutuion are presented here, and the Fifth Circuit's opinion reached no such questions. Moreover, given the continued abuse of the federal court system by Petitioner and the total disregard by Petitioner and her counsel of orders by the District Court and the Fifth Circuit, Petitioner cannot credibly assert that any Court abused its discretion in giving the Petitioner almost eight years to draft an intelligible complaint.

Not surprisingly, the Petition for Writ of Certiorari totally ignores this issue and deals only with vague and meritless constitutional issues. Petitioner's continued reliance in the Petition on this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1947), ignores, perhaps deliberately, the Fifth Circuit's ruling that occasions this appeal. In *Conley*, the Court decided an issue of jurisdiction under the Railway Labor Act. The Court held that the complaint should not have been dismissed for lack of jurisdiction, and went on, in dictum, to state that the plaintiff's com-

plaint had adequately set forth a claim under the Federal Rules of Civil Procedure in effect at that time. *Id.* at 45-48.

The famous *Conley* language dealing with the general sufficiency of a complaint under the Federal Rules is totally irrelevant to this case. On this appeal, the Fifth Circuit did not decide whether any of Cates' complaints stated a cause of action, and no interpretation of the Fifth Circuit's opinion presents that issue to this Court. This case presents only the abuse of discretion issue, noted above, directed to the District Court's dismissal of the post-remand complaints for failure to comply with its own mandates or those of the Fifth Circuit.

Thus, no conflict exists between the Fifth Circuit's holding and the *Conley* opinion. This Court need not devote attention and time to Petitioner's argument that a denial of the Petition will "deprive" Petitioner of her constitutional rights to a trial by jury. It is much too late to contend that dsimissal of an action as a sanction for improper pleading and refusal to comply with valid district court orders is unconstitutional. *See Societe Internationale Pour Participations Industrielles et Commercialles, S.A. v. Brownell,* 357 U.S. 197 (1958). In this case, both the Fifth Circuit and the District Court have given Petitioner every chance to draft a complaint that could be the basis of a lawsuit, yet after eight years, none has been forthcoming. Clearly, this is not a case where constitutional rights have been violated, or even implicated, and certainly not a case presenting any special circumstances or conflicts among the courts of appeal that would merit granting the Petition.

II. The District Court Committed No Abuse of Discretion By Terminating This Action.

Although Cates has failed to address the issue, Respondent submits that the District Court did not abuse its discretion in taking any of the post-remand actions described in the Statement of the Case, including dismissing Petitioner's complaints for failure to comply with the orders of the District Court and denying Petitioner leave to file the Second through Fifth Amended Complaints. Further, the District Court and the Fifth Circuit fully considered the issues based on an extensive record and concluded that those Courts decided correctly.

A. The Dismissal Order Must Stand Unless The District Court Abused Its Discretion

The District Court's April 11, 1986 Order granting Defendants' Joint Motion to Dismiss does not state whether Cates' Complaint was dismissed with or without prejudice. Therefore, the Complaint is deemed to have been dismissed with prejudice. *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985).

Dismissals with prejudice under Fed. R. Civ. P. 8, 16(f), and 41(b) are reviewed on appeal under the standard of abuse of discretion. *Id.; Rodgers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982). Likewise, any error in denying leave to amend is reviewed under the abuse of discretion standard. *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 650 (9th Cir. 1984). Under the standard developed expressly for review of Rule 41(b) dismissals and adopted for Rule 16(f) dismissals, a dismissal will be affirmed where there is a showing of:

(1) delay or contumacious conduct; and

(2) the failure or futility of lesser sanctions; and

(3) the presence of aggravating factors, such as delay caused by Plaintiff, prejudice to Defendants, or delay caused by intentional conduct.

Callip at 1519; *Rodgers* at 320.

Characteristically, Cates has ignored this pivotal issue. Nevertheless, case law conclusively demonstrates that the District Court did not abuse its discretion in finally dismissing Cates' Fourth Amended Complaint. As the chronological list of events set forth in Appendix I attached hereto establishes, delay, contumacious conduct, aggravating factors and the futility of lesser sanctions are all abundantly present in this suit.

B. Cates Repeatedly Filed Defective Complaints in Defiance of Court Orders

By asserting that the Federal Rules of Civil Procedure only require notice pleadings, and that her allegations of fraud, conspiracy and special damages provide sufficient notice of her claims, Cates misses the point. Cates' Complaints were ultimately dismissed on *two* grounds: not only were these Complaints defective as a matter of form; in addition, Cates repeatedly violated the District Court's orders. Both of these arguments were urged by Defendants in their successful Joint Motion to Dismiss and were found meritorious by the District Court.

In her Petition, Cates conspicuously omits any reference to her well-documented history of disregarding Court Orders. As discussed below, this alone is sufficient basis for affirming the District Court's order of dismissal.

Even so, Cates' assertion that "notice pleading" is sufficient under the Federal Rules is erroneous. As the Fifth Circuit has recently emphasized, even in a suit alleging conspiracy,

> the day is past when our notice pleading practice—circumscribed only by a requirement of subjective good faith on the pleader's part—plus liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case or not.

Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986). Neither appellate nor trial courts "sit to serve as implements of financial torture and delay, to be applied to hapless parties at the pleasure of counsel." *Id.* at 692. Thus, Cates' argument that mere "notice" of claims is sufficient finds no support in recent case law.

Even under the minimal "notice" standard, Cates' Complaints were fatally defective. Cates' Third Amended Complaint failed to address the crucial "special requirements" issue raised by the Fifth Circuit in ordering remand. *See* 756 F.2d at 1178-79, 1180, 1183. Instead, Cates attempted to add new claims and parties *six years* after the inception of this litigation and over *three years* after James Cates, the central witness, had died. Clearly Stratton and the ITT Defendants would have suffered prejudice as a result of Cates' unjustified delay in adding these claims and parties. *Foman v. Davis,* 371 U.S. 178 (1962); *Freeman v. Continental Gin Co.,* 381 F.2d 459, 469 (5th Cir. 1967).

In addition, Federal Rule of Civil Procedure 8 provides that each averment of a pleading shall be simple, concise, and direct. Fed. R. Civ. P. 8(e)(1). Where a

plaintiff fails to comply with Rule 8, the normal course is to dismiss the complaint with leave to amend. However, if after numerous opportunities to amend have been allowed, the plaintiff still cannot comply with Rule 8, the appropriate course of action is to dismiss the complaint. Thus, for example, where plaintiff filed three unsuccessful complaints based on substantially the same facts, the district court did not abuse its discretion in dismissing the third compliant with prejudice since it appeared that no mere amendment could cure the defects. *See, e.g., Feinberg v. Leach,* 243 F.2d 64, 68 (5th Cir. 1957).

In another Rule 8 case, the Eighth Circuit upheld dismissal of the action on facts similar, but less compelling, than the sequence presented herein. *See Michaelis v. Nebraska State Bar Association,* 717 F.2d 437 (8th Cir. 1983). The original complaint was dismissed without prejudice and with leave to amend for failure to comply with Rule 8. Plaintiff then filed an amended complaint substantially similar to the first complaint in form, content, and parties. The District Court dismissed the amended complaint with prejudice. In upholding the District Court's dismissal, the Court of Appeals stated that

> [i]f the plaintiff has persisted in violating Rule 8, the District Court is justified in dismissing the complaint with prejudice.

Id. at 439. In *Michaelis,* Plaintiff's complaint was "needlessly long, repetitious, and confused," *id.* and "the style and prolixity of these pleadings would have made on orderly trial impossible." *Id.*

Though describable in similar terms, Cates' pleadings are even more egregious than those cited above. Cates has

filed not two, but five amended complaints. Cates' complaints have repeatedly been branded "defective as a matter of form." After almost eight years of litigation, it is painfully obvious that Cates cannot or will not comply with Fed. R. Civ. P. 8. Therefore, under the authority cited above, the District Court properly dismissed Cates' Complaints with prejudice.

Likewise, the allegations of conspiracy and fraud do not contain the particulars required by Fed. R. Civ. P. 9. For example, Cates alleged that all Defendants were "conspiring," but alleges neither the manner in which Defendants conspired nor any acts to support the conspiracy. In addition, after six years of protracted procedural failures, Cates requested for the first time an injunction and the stay of federal court proceedings pending the appointment of a receiver in the companion state court case. Clearly, at that late date, Cates could not have demonstrated irreparable harm. In view of these and other procedural deficiencies, the District Court demonstrated admirable restraint in decreeing that Cates' pleadings were "defective as a matter of form."

Cates asserted that the District Court erred in denying Cates leave to file the Fourth Amended Complaint. However, that complaint was merely a clone of the rejected Third Amended Complaint. Where new claims are merely repetitions of prior complaints, or are the subject of a separate suit, or have already been determined, a District Court should deny leave to amend. *See Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 548 (5th Cir. 1980); *Buckley Towers Condominium v. Backwald*, 533 F.2d 934, 939 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1976). Similarly, where a plaintiff, like Cates, fails to plead the

essential facts supporting his claim, his claim is subject to dismissal and leave to amend should not be granted. *Jones v. Community Redevelopment Agency,* 733 F.2d 646, 650 (9th Cir. 1984). Likewise, where the proposed amended complaint fails to cure the deficiencies of the original, leave to amend should be denied. *Textor v. Board of Regents of Northern Illinois University,* 711 F.2d 1387, 1391 (7th Cir. 1983) and *Mosler v. M/K Ventures International, Inc.,* 103 F.R.D. 385, 387 (N.D. Ill. E.D. 1984). Thus, the District Court justifiably rejected Cates' equally defective Fourth Amended Complaint.

C. Sanctions More Lenient Than Dismissal Have Failed

In upholding a dismissal pursuant to Fed. R. Civ. P. 16(f) or 41(b), the record must show that more lenient sanctions have failed or were futile. Case law demonstrates that "lenient" sanctions include warnings or additional opportunities to comply with orders. Both of these more lenient sanctions were utilized by the District Court without success. See App. I.

Callip v. Harris County Child Welfare Dept., 757 F.2d 1513 (5th Cir. 1985) closely resembles the present suit. In *Callip,* plaintiff, like Cates, failed to comply with at least nine deadlines. As in the present case, the District Court provided additional time within which to comply. In affirming the District Court's dismissal, the Fifth Circuit found that providing plaintiff with a "second or third chance following a procedural default" served as "a lenient sanction, which when met with further default" justified the ultimate sanction of dismissal. *Id.* at 1521. Two other Fifth Circuit cases suggest a similar result: *Porter*

v. Beaumont Enterprise & Journal, 743 F.2d 269, 272 (5th Cir. 1984), in which the Fifth Circuit found that providing counsel with "another opportunity to correct a procedural default satisfied the 'lesser sanction' requirement," and *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1160 (5th Cir. 1985), where the Fifth Circuit affirmed a dismissal, finding that since

> plaintiff will not be able to pursue his action in the future, dismissal with prejudice was actually the "lesser sanction" because defendants' costs were not adjudged against plaintiff.

O'Brien v. Sinatra, 315 F.2d 637 (9th Cir. 1963) is also factually similar to the present suit. In *O'Brien*, plaintiff brought suit for copyright infringement regarding several movies. Some four years after the commencement of the suit, plaintiff still had not filed a claim that "could be understood and tried." *Id.* at 639. Like the District Court in the present suit, the *O'Brien* Court entered an order restricting the number of claims and defendants which plaintiff could include. Nevertheless, plaintiff violated the Court Order and his cause was dismissed. In language pertinent to the present suit, the Ninth Circuit upheld the dismissal, noting that the defendants were

> entitled to have the claim or claims stated in a justifiable manner. Appellant chose not to meet the requirement which was not only reasonable but was absolutely essential to the eventual termination of the litigation.

Id. at 642. The Ninth Circuit also insightfully observed that defendants have rights, too. To protect defendants' rights, it was "the obligation of the Court to determine at what point Plaintiff would be foreclosed from further

harassing Defendants with confused and confounding complaints." *Id.* at 642. *See also Fendles v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975) (where district court ordered that the *Third* Amended Complaint be limited to certain expressly stated claims, complaint dismissed with prejudice when it did not meet specification).

In a similar manner, Cates was given far more than a "second or third chance" following procedural defaults. In addition, the orders of the District Court as well as the opinion of the Fifth Circuit are replete with "explicit warnings" of the impending dismissal. *Cates v. International Telephone & Telegraph Corp.*, 756 F.2d 1161, 1181 (5th Cir. 1985) (" . . . the District Court need [not] countenance improper pleading . . . "). Finally, Stratton filed a Motion for Sanctions on two occasions. The District Court considered these "more lenient" sanctions and denied them, obviously finding them futile. Thus, the record clearly demonstrates that more lenient sanctions were considered and atempted on numerous occasions to no avail. After almost eight years of litigation and five amended complaints, Cates has proven herself incapable of drafting anything but a "confused and confounding" complaint. Therefore, Cates has reached the point at which she should be "foreclosed from further harassing" Stratton.

D. Federal Rules of Civil Procedure Specifically Authorized the District Court To Dismiss Cates' Complaints

Although the District Court in its Order did not expressly cite the procedural basis for its dismissal of Cates' Complaint, both Fed. R. Civ. P. 16(f) and 41(b) support such a dismissal. Rule 16(f) provides that

> [i]f a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference . . . the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2) (B), (C), (D).

Rule 37(b)(2)(C) provides for the dismissal of an action.

Price v. McGlathery, 792 F.2d 472 (5th Cir. 1986), a case strikingly similar to the present suit, demonstrates the application of Fed. R. Civ. P. 16(f). There, like Musslewhite, plaintiff's counsel failed to appear at a pre-trial conference, failed to file a pre-trial order and failed to certify his intent to comply with the Court's pre-trial instructions and procedural rules. The District Court found that Price, like Cates, had a "history of disobedience of the Court's orders" and dismissed Plaintiff's complaint.[3] The Fifth Circuit upheld the District Court's dismissal finding that the record disclosed a "clear pattern of delay and contumacious conduct," although, parenthetically, nothing in the record indicated that plaintiff herself was at fault. *Id.* at 474-475. *See also Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (Court of Appeals upheld

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3. Additionally, Musslewhite's vexatious pleading and contumacious conduct in this suit is not an isolated occurrence; it is a deliberate and abusive method of prosecuting lawsuits as detailed in another case pending in the District Court of the Southern District Court of Texas. *Ginther v. Texas Commerce Bank, et al.* Civil Action No. 8-85-6191 (S.D. Tex., May 28, 1986). In *Ginther*, Musslewhite employed the same abusive and prejudicial tactics as in the present suit, and sanctions were awarded in the amount of $167,000 against Musslewhite and his client.

dismissal where plaintiff's counsel engaged in pattern of delay, disobeyed court's instruction to be ready to proceed with trial, and deliberately refused to comply with court's directions).

This case demonstrates the same clear pattern. On April 11, 1986, the District Court entered its Order denying Cates' Fourth Complaint Motion and granting Defendants' Joint Motion to Dismiss with prejudice. In their Joint Motion to Dismiss, Defendants demonstrated that Cates had refused to comply with the District Court's February 7, 1986 Order and failed to correct her pleading deficiencies. The February 7, 1986 Order had commanded Cates to:

(1) allege fraud and conspiracy in compliance with Fed. R. Civ. P. 9;

(2) allege specific acts of Cates' partners' bad faith in refusing him permission to file suit;

(3) state specifically any special damages in compliance with Fed. R. Civ. P. 9;

(4) plead the facts supporting jurisdiction in compliance with Fed. R. Civ. P. 8(a) and 8(e);

(5) omit any mooted claims, including Cates' authority to file suit or maintain the suit on behalf of the Partnerships;

(6) omit any new parties not included in the Second Amended Complaint;

(7) omit any new claims not specifically included in the Second Amended Complaint, including claims

for violations of RICO and the Texas Deceptive Trade Practices Act;

(8) comply with the Fifth Circuit's opinion in the first appeal by separating Cates' personal claims and deleting "Cates" as a contracting party; and, finally,

(9) comply with the District Court's Order within twenty days of February 7, 1986.

In light of the conduct of Cates and her counsel, the February 7, 1986 Order was eminently fair and provided Cates with yet another opportunity to address the sole issue raised by the Fifth Circuit. Instead, Cates defied the District Court's directive in every respect. First, Cates defiantly refused to comply with the District Court's February 7, 1986 Order *within the twenty days* expressly allotted by the District Court. Although Cates filed a last minute Motion for Extension on the day the Amended Complaint was due, that Motion was never granted. In the context of Cates' history of blatant disregard for Court-set deadlines, this failure to meet the deadline set forth in the February 7, 1986 Order in itself warranted dismissal.

Cates also refused to comply with the other dictates of the District Court's Order. Even after the belated Fourth Amended Complaint was finally filed, it was defective. In defiance of the first three directives of the District Court, the particulars of the fraud or conspiracy, the bad faith of Cates' partners, and special damages were still missing or inadequate.

In contravention of the fourth directive, Cates' rambling, disjointed pleading, in which some paragraphs ex-

tended for 5 pages, is anything but simple, concise, or direct. Fed. R. Civ. P. 8. Moreover, the jurisdictional allegations contain a fatal self-contradiction: diversity jurisdiction is alleged even though three of the defendants, like Cates, are clearly Texas residents. Additionally, in violation of the fifth directive, moot or improper claims, such as diminuation of value of Partnership interest or share of Partnership income, breach of agreements, tortious interference with business, anticompetitive conduct interfering with or limiting business, loss of business reputation or goodwill, loss of opportunity for advancement, and loss of prospective advantage, were still included (paragraphs 24, 25, 46-50). In violation of the sixth directive, Cates named new parties, including, as noted, three non-diverse defendants.

In violation of the seventh instruction, Cates once again added new causes of action for slander and slander of credit, conversion, libel, and wrongful death. In violation of the eighth instruction, all of Plaintiff's individual damage claims were identical to the Partnership claims and dependent on injuries to the Partnership. Finally, despite the explicit command of the Fifth Circuit to set forth "exceptional circumstances" justifying the award of relief to a minority partner, no such allegations appear. *Thus, in addition to violating the basic standards of pleading required by the Federal Rules, Cates violated each and every instruction issued to it by the District Court and the Fifth Circuit.*

As for "contumacious conduct", this requirement is supplied by Cates' misrepresentations concerning the purported "appointment" of a receiver in the companion

state court case. On numerous occasions Cates has represented that a reciever was "appointed" in the companion state court case. Cates has urged this "fact" as grounds for delay, for granting a new trial, and for reversing the District Court's dismissal of Cates' causes of action.

An examination of the state court docket sheet, the Order of April 4, 1986, and the Order of July 28, 1986, demonstrates that no court ever intended to appoint a receiver. See App. II, III, and IV, respectively. As the docket sheet attests, on April 4, 1986, the only motion to be considered in the companion state court case was a Motion to Retain. Although Texas Rules of Civil Procedure 695 and 695(a) require notice of an application for receiver and the posting of a bond, no mention is made of an application for receivership. Interestingly, however, the April 4, 1986 Order emanating from that hearing goes beyond the scope of the motion scheduled on the docket sheet. Apparently unwittingly, Judge Gupton, a visiting Judge, signed an Order directing not only that the case be retained upon the docket, but also that "a receiver [be] appointed." Months later, but long before Cates filed her Brief to the Fifth Circuit, counsel for Defendants in the companion state court case became aware that the Order granting the Motion to Retain also surreptitiously included language "appointing" a receiver. Therefore, on July 28, 1986, Visiting Judge Gupton signed an Order correcting and rescinding the language of the April 4, 1986 Order. Cates has repeatedly trumpeted the now defunct April 4, 1986 Order as authority for the "appointment" of a receiver, but has conspicuously omitted any mention of the subsequent July 28, 1986 correction.

Thus, the "appointment" of a receiver in the companion state court action was nothing more than a charade. Cates and Musslewhite apparently perpetrated a fraud on the unwitting state court by submitting an Order containing language superfluous to the docketed Motion to Retain. Cates and Musslewhite have repeatedly used the fruits of that fraud to support their arguments against dismissal before the District Court and the Fifth Circuit. Months before Cates filed her brief in the Fifth Circuit, the fraudulent Order "appointing" a receiver had been corrected and the erroneous language rescinded. Nevertheless, Cates, over Musslewhite's signature, has continued to allege that a receiver has been "appointed."

Thus, in the present case, Cates has exhibited a pattern of delay and deliberate refusal to comply with the directives of the District Court and the Fifth Circuit. Furthermore, on at least one occasion, Musslewhite failed to appear at a pre-trial conference without prior notification to the Defendants' counsel, resulting in needless delay and expenses. Finally, after almost a decade of litigation, at the docket call Cates announced that she was not ready for trial. Therefore, because the record reveals Cates' contumacious conduct *and* delay, the failure of lesser sanctions and a panoply of "aggravating factors", including misrepresentation in three different courts, the District Court properly dismissed Cates' Fourth Amended Complaint.

III. The Grant to Cates by a State Court of an Interest in this Action After its Dismissal by the District Court Does Not Renew the Action.

Cates asserts that the District Court erred in dismissing her claims because the 151st Judicial District Court of

Harris County, Texas approved an agreed Final Judgment partitioning to Cates a fractional interest in the assets of the Partnership. First, as that Final Judgment expressly states, Cates did not receive a fractional interest in "all assets" of the Partnership. She received an interest in this lawsuit. Second, the Final Judgment was approved on June 25, 1986—over two months after Cates' claims were dismissed. Therefore, the partition was too late to affect the present suit. Finally, as discussed above, Cates ignores the fact that her claims were dismissed because of her failure to comply with court orders. Any partitioning of an interest in this lawsuit has no bearing on the District Court's dismissal.

———o———

CONCLUSION

For the reasons noted above, Respondent respectfully requests that this Court deny Petitioner's Request for a Writ of Certiorari.

Respectfully submitted,

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Albert J. Stratton, On Behalf Of
Himself and Certain Other
Underwriters at Lloyds

APPENDIX I

List of Conduct of Petitioner

1. *June 26, 1980*—The District Court ordered that responses to the then extent Motion to Intervene be filed no later than August 4, 1980. Cates filed her response on August 7, 1980, *three days late.*

2. *August 6, 1980*—Cates filed her Motion to Defer Adjudication of Motion to Drop Parties claiming, over Musslewhite's signature, that "Plaintiff simultaneously received an extensive reply of Intervenors to Plaintiff's response and . . . Plaintiff has not had sufficient time to consider, brief, and prepare for [such reply]." Contrary to Cates' representation to the District Court, the Intervenors' reply was actually *filed June 20, 1980,* weeks before.

3. *October 20, 1980*—The District Court entered an Order granting one of Cates' many requests for an extension of time.

4. *January 16, 1981*—Cates filed yet another Motion for Extension of Time.

5. *August 28, 1981*—Cates again filed a Motion for Extension of Time, this time to answer requests for admissions. In that Motion, Cates represented, over Musselewhite's signature, that Cates did not receive the requests for admission. In actuality, as was established by Defendants' Opposition to Plaintiff's Motion, Cates had in fact received the requests for admissions as attested by the green domestic return receipt card and the affidavit of William Key Wilde

recounting the statement by Ken Craig, of Musselwhite's office, wherein he admitted receiving the requests.

6. *April 14, 1982*—The District Court in its Order conclusively found that, *contrary to Musslewhite's representations* to the Court, Musslewhite had "received the requests for admissions on June 21, 1981 and failed to answer within the time provided by Rule 36."

7. *June 25, 1982*—The District Court entered an Order commanding Cates to file his Response to Stratton's Motion for Summary Judgment *no later than August 2, 1982.*

8. *June 28, 1982*—Cates nevertheless filed yet another Motion for Extension of Time to Respond to Stratton's Motion for Summary Judgment.

9. *August 8, 1982*—Cates finally filed his Response to Stratton's Motion for Summary Judgment—*three days late.*

10. *August 17, 1982*—Cates filed yet another Motion to Extend Time for Filing Response to Motion for Summary Judgment.

11. *October 26, 1982*—In its Order, the District Court first voiced a warning that echoed throughout the coming years: ". . . this case has been a procedural thorn in the side of this Court."

12. *December 21, 1982*—Once again the District Court in its Order blasted Musslewhite's conduct stating . . . This protective order is necessitated by Plaintiff's counsel's [Musslewhite's] *failure to comply with the*

filing and discovery deadlines imposed by Order of this Court dated October 26, 1982, and this Order is necessary to protect Defendants from unnecessary expense and prejudice as a result of Plaintiff's failure to comply with this Court's October 26, 1982 Order. (emphasis added).

13. *February 16, 1983*—Once again, the District Court pointedly warns that Cates "has attempted to state and sue on causes of action . . . which had previously been dismissed by this Court's Order of April 14, 1982."

14. On the first appeal to the Fifth Circuit, Cates continued her contumacious conduct and delay. On *September 16, 1983,* Cates filed her Motion for Leave to File Brief Out of Time. This Motion was later followed by Cates' Motion to File Rough Draft Form of Brief.

15. *November 4, 1985*—After remand by the Fifth Circuit to the District Court, Defendants filed their Motion to Set Agenda for Pretrial Matters as requested by the District Court. This Motion was filed unilaterally by Defendants because of Cates' refusal to cooperate in finalizing an Agreed Agenda as instructed by the District Court.

16. *December 6, 1985*—A pretrial conference was cancelled. Counsel for all of the Defendants attended the conference. However, Musslewhite, without prior notification, unilaterally "passed" the hearing, alleging that he was in trial.

17. *February 26, 1986*—Cates filed yet another Motion for Continuance.

18. *February 27, 1986*—Cates filed yet another Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint.

19. *March 5, 1986*—Cates filed yet another Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint.

20. *March 7, 1986*—Cates' Motion for Continuance was denied.

21. *March 10, 1986*—The District Court held docket call. Cates announced that she was not ready.. Cates' Motion for Continuance was denied.

22. *March 27, 1986*—After Cates' causes of action had been dismissed, Cates filed yet another Motion for Extension of Time.

23. *September 12, 1986*—Cates filed her Notice of Appeal to the Fifth Circuit, over six months after the Order dismissing her Complaint was entered.

24. *December 29, 1986*—Defendants filed their Motion to Dismiss Appeal for Appellant's Failure to Prosecute. Cates had requested and was granted *two extensions* within which to file her brief, but, nevertheless, the extensions expired on December 22, 1986, without any brief being filed.

RGR06/01

App. 5

APPENDIX II

80- 35964 Filed 11 19 85

James N. Cates

PLAINTIFFS

Benton Musselwhite

Attorneys

NATURE OF ACTION

Injunction

VS.

H C Petty, III, et al

DEFENDANTS

Attorneys

SURETIES ON COST BOND

19

Jury Fee Paid By

SETTINGS

General Order of Court 4-1515

10-20-86 Canal for Pltff at Deft's failed & Pltff for hearing on application for T/I

FEB 18, 1985 MOTION FOR S/J, PLEA IN ABATEMENT, MTN TO DISMISS, MTN TO DISQUALIFY PLTF'S ATTY AND MTN FOR SECURITY Agreed Order signed ADPT

APR 2 1985 MTN TO RETAIN Granted. Case is RETAINED ONLY through OCT 2, 1985 ADPT

April 4 1986 Motion to Retain Granted. Set for Trial at 11:30 AM etc Oct 6, 1986 — DM Sugarman D.J.

~~APR 1986~~

~~APR 1986~~

JUN 25, 1986 Final judgment signed and proper order to be presented. W.R.P. JB, GC

APPENDIX III

CAUSE NO. 80-35964

JAMES M. CATES	)	IN THE DISTRICT COURT OF
	)	
VS.	)	HARRIS COUNTY, TEXAS
	)	
G.C. PETTEY, III	)	151st JUDICIAL DISTRICT

ORDER

The motion of Plaintiff to retain this case upon the docket and the Court being of the opinion that same should be in all things granted;

IT IS ORDERED that this case be retained upon the docket, a Receiver appointed, a reasonable period of time for discovery and this case certified for trial on this day of April 4, 1986 at 10:30 o'clock at a.m.

/s/ M. Gupton
Judge Presiding

April 4, 1986

APPENDIX IV

NO. 80-35964-A

JAMES N. CATES, Now Judy CATES, Individually and as Testatrix of the Estate of JAMES N. CATES, Deceased	)	IN THE DISTRICT COURT OF
VS.	)	HARRIS COUNTY,
G. C. PETTEY, III; ROBERT J. BOYER; J. MICHAEL COLLINS; SANJAC INTERNATIONAL, A Partnership; SAN JACINTO CORPORATION; SAN JACINTO ASSOCIATES, A Partnership	)	TEXAS 151st JUDICIAL DISTRICT

O R D E R

BE IT REMEMBERED that on the 28 day of July, 1986, came on to be heard the Motion to Correct Order of the parties and the counsel to correct a preceding Order in this case having been presented to the Court, and the Court having considered same, the Court is of the opinion that same should be in all things granted. It is, therefore,

ORDERED that the Court's Order of April 4, 1986 referred to and incorporated in "Motion to Correct Order" be in all things withdrawn and corrected to read as follows:

"O R D E R

BE IT REMEMBERED that on the 4 day of April, 1986, came on to be heard the Motion of Plaintiffs to retain this case upon the docket and the Court

being of the opinion that same should be in all things granted;

IT IS ORDERED that this case be retained upon the docket.

SIGNED AND ENTERED this 28 day of July, 1986.

/s/ M. Gupton
Judge Presiding

APPROVED AS TO FORM
AND SUBSTANCE:

LAW OFFICES OF JACK R. BAILEY
/s/ Jack R. Bailey
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ATTORNEY FOR DEFENDANTS

.....

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ATTORNEY FOR PLAINTIFFS"